No. 95-1608

(7)

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

LOU MCKENNA, Director, Ramsey County Department of Property Records and Revenue; JOAN ANDERSON GROWE, Secretary of State, State of Minnesota,
Petitioners,
v.
TWIN CITIES AREA NEW PARTY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF FOR THE REPUBLICAN NATIONAL COMMITTEE AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

20pp

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INTERESTS OF AMICUS CURIAE

This brief is submitted on behalf of the Republican National Committee ("RNC"), the national committee of the Republican Party.[1] Because this case directly affects the rights of political parties to nominate and elect their candidates for office without interference from the gov-

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[1] The RNC files this brief with the consent of both parties, as reflected in separate submissions to the Court.

ernment, it is one of vital importance to the RNC. The RNC brings a particularly valuable perspective to this issue because, while this statute affects the relationship between the government and both minor and major political parties, the only parties to the case are the government and a minor political party.

SUMMARY OF ARGUMENT

The Petitioners fundamentally misconstrue the rights at issue in this case. This case addresses not "the extent to which states must . . . maximize opportunities for minor political parties to have a significant impact" upon elections (Br. 8), but instead the extent to which states may *interfere* with the well-established and vitally important associational rights of political parties. The challenged statute, Minn. Stat. § 204B, effectively prohibits a political party from nominating for the ballot its chosen candidate where that candidate has already been nominated by another party. Because the Minnesota statute severely burdens political parties in their attempts to speak to the public and broaden their base of support, and does so for no legitimate reason in the particular circumstances of this case, application of the statute to the Respondent is unconstitutional.

This Court has repeatedly recognized the importance of the associational rights of political parties, and has explained that significant burdens upon the right of parties to nominate candidates for office must be narrowly tailored to a compelling governmental interest. As applied to this case, the Minnesota ban on individual candidates appearing on the ballot for more than one party, referred to as "fusion," severely burdens the ability of political parties to choose whom they would like to nominate for public office and to broaden their base of support. Indeed, the statute directly stymies political parties from carrying out their most fundamental activity. Thus, the ban is constitutional only if it is narrowly tailored to a compelling governmental interest.

As applied to the particular facts of this case, none of the offered justifications for the fusion ban are sufficient to meet this high standard. Rather than fostering voter confusion, fusion actually encourages a more informed electorate by providing additional information about candidates and their positions. Fusion bans are not narrowly tailored to prevent ballot manipulations because minor parties are fully capable of preventing "party raiding" through other (constitutional) means and because states are free to require minimum levels of support before candidates appear on the ballot.

The only governmental interest that might in some circumstances justify a ban on fusion is one that has been recognized repeatedly by this Court: the need to prevent "splintered parties and unrestrained factionalism." *See Storer v. Brown*, 415 U.S. 724, 735 (1974). In circumstances where two parties do not consent to a dual nomination ("involuntary fusion"), fusion permits losers in a party primary to form their own party and nominate the same candidate on a different party line in order to push their issues back into the public spotlight. Such a practice strikes at the heart of the party primary process, allowing the same intraparty battles to be fought for a second time during the general election. Where, as in this case, both parties consent to the dual nomination ("voluntary fusion"), there is no such danger, and this interest does not support the statutory fusion ban at all. Indeed, the Petitioners admit as much in their Opening Brief. *See* Br. 50. Therefore, application of this statute to the Petitioners is unconstitutional and the judgment of the court of appeals should be affirmed.

ARGUMENT

I. BECAUSE § 204B SEVERELY BURDENS THE NEW PARTY'S ASSOCIATIONAL RIGHTS, IT IS CONSTITUTIONAL ONLY IF IT IS NARROWLY TAILORED TO A COMPELLING GOVERNMENTAL INTEREST

A. Severe Restrictions Upon a Political Party's Access to the Ballot Are Subjected to the Strictest Scrutiny

American citizens undeniably enjoy a fundamental constitutional right to create, develop, and sustain political parties. *Williams v. Rhodes*, 393 U.S. 23, 31-32 (1968); *Norman v. Reed*, 502 U.S. 279, 288 (1992). This right "advances the constitutional interest of like-minded voters to gather in pursuit of common political ends, thus enlarging the opportunities of all voters to express their own political preferences." *Norman*, 502 U.S. at 288. It thus assures an "unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. United States*, 354 U.S. 476, 484 (1957).

Central to the pursuit of common political ends is the right of all political parties, old and new, to select a "standard bearer who best represents the party's ideologies and preferences." *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 224 (1989). For both political parties and voters, elections are "the crucial juncture at which the appeal to common principles may be translated into concerted action, and hence to political power in the community." *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 216 (1986). The nomination of a standard bearer is a focal point for the creation of public policy, providing a mechanism for voters to engage in political debate and elect the candidates who best represent their views. Therefore, when a state severely restricts a political party's access to the ballot, this Court has required that the restriction be narrowly drawn to advance a compelling state interest. *Norman*, 502 U.S. at 288-89.

B. The Burdens Imposed by § 204B Are Particularly Severe

1. *Prohibiting a Party from Nominating Its Chosen Candidate Restricts Its Ability to Express Political Ideas and Participate in the Political Process.*

A political party's choice of a candidate is its defining moment. It is the culmination of often intense debate over the proper direction of the party and of government. Having emerged as the nominee of a party, the candidate comes to symbolize the party's goals and values to the public and to the party itself. The party rallies around the individual whom it believes best personifies its goals and whom it believes will be the best leader. The nomination thus becomes the outlet for all of the party's political speech and associational rights. While a party has its own interests and ideals separate and distinct from its candidates, "in the context of particular elections, candidates are necessary to make the party's message known and effective, and vice versa." *Colorado Republican Fed. Campaign Comm. v. Federal Election Commission*, 116 S.Ct. 2309, 2322 (1996) (Kennedy, J., concurring in part and dissenting in part). Because of the importance of the nomination process, denying a party the right to put its nominee on the ballot is a most fundamental restriction upon that party's autonomy and power.

Without the right to place its candidate on the ballot, there is less reason for party members to engage in the public debate in the first place. The center of a political party's existence is its ability to act as a vehicle for ordinary citizens to engage in government by learning about, nominating, campaigning on behalf of, and voting for candidates for public office. When a political party lacks the ability to serve as such a vehicle, like-minded citizens cannot fully participate in the political process. As this

Court recognized in *Anderson v. Celebrezze*, 460 U.S. 780, 787-88 (1983), "The exclusion of candidates . . . burdens voters' freedom of association, because an election campaign is an effective platform for the expression of views on the issues of the day, and a candidate serves as a rallying-point for like-minded citizens."

Denying the New Party access to the Minnesota ballot forces it to choose between two unacceptable courses of action. First, the Petitioners suggest (Br. 18-19) that the New Party could decline to nominate another candidate, and instead merely endorse publicly another party's candidate. This option, however, relegates the New Party to the status of a mere bystander and removes the New Party from the public eye. Because the nomination process is so central to the party's function, merely speaking out on behalf of another candidate without actually seeing the party's endorsement on the ballot robs the party of its legitimacy. While the party can still speak out on behalf of that candidate, its speech *as a party* ultimately must take place on the ballot. Any other speech is hollow in comparison.

Second, Petitioners suggest that the New Party can nominate another candidate for the office in question. However, this requires the party to communicate to the public a view that its members do not actually believe, namely that its second choice is actually the candidate whom it would like to see elected. It prevents the New Party from expressing the exact ideas and policies it desires when it engages in the highest form of political expression. It forces the party to organize its resources, time, and efforts in support of a candidate whose platform the party may not feel is the best possible public policy or whom the party may not believe to be the most effective leader.

Indeed, this Court has repeatedly recognized the importance of our political parties' right to nominate and support candidates without interference from the govern-

ment. For example, in *Eu v. San Francisco Democratic Cent. Comm.*, 489 U.S. 214 (1989), the Court invalidated a state law that prohibited political parties from endorsing candidates in a primary election. In *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986), it recognized that parties have a constitutional right to permit non-members to vote in their primaries. In *Democratic Party of United States v. Wisconsin ex rel. La Follette*, 450 U.S. 107 (1981), and *Cousins v. Wigoda*, 419 U.S. 477 (1975), it upheld party rules governing the selection of national convention delegates over conflicting state law. And just last term in *Colorado Republican Fed. Campaign Comm. v. Federal Election Commission*, 116 S.Ct. 2309 (1996), the Court explicitly rejected arguments that political parties pose any special dangers of corruption and recognized that they must be permitted to make unlimited independent expenditures in support of their candidates for federal office. This restriction upon party activity, which thwarts the New Party from performing its most fundamental role, is as odious an erosion of political parties' rights as any of these statutes and must be given the same exacting scrutiny.

2. *Preventing a Party from Nominating Its Chosen Candidate Restricts Its Ability To Broaden Its Public Support.*

A party's associational rights undeniably include attempts to "broaden the base of public participation in and support for its activities." *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 214 (1986). Banning voluntary fusion burdens these rights in two ways.

First, fielding candidates whom voters will identify with that political party educates the public about that party and enables it to attract like-minded voters. *See id.* The views of a party's nominee exemplify those of the party she represents. The nomination process forces the candidate to define her positions, and obtaining the nomina-

tion necessarily implies that party members have accepted those positions. Preventing a party from nominating a chosen candidate who enjoys a minimum level of support thus blocks the party from presenting itself to the public, thereby impeding its ability to attract like-minded voters.

Second, as the Eighth Circuit noted in this case, "[a] party's ability to establish itself as a durable, influential player in the political arena depends on its ability to elect candidates to office." *McKenna v. Twin Cities Area New Party*, 73 F.3d 196, 199 (8th Cir. 1996); *see also Williams v. Rhodes*, 393 U.S. at 31 ("[T]he right to form a party for the advancement of political goals means little if a party can be kept off the election ballot and thus denied an equal opportunity to win votes."). A political party must convince potential members that it has the ability to get its candidates elected. Electoral viability encourages voters to join by demonstrating to potential members that their votes and efforts will positively affect the political process. Where a minor party is prohibited from nominating a candidate with a good chance of winning, however, new members will be discouraged from joining out of a fear that their votes will be wasted.

This impact need not be limited to getting a candidate elected on a single-party line. No less than a major party that elects a single-party candidate, a minor party that provides the swing votes that put a multi-party nominee over the top and into office substantially influences an election. This determinative impact on an election demonstrates to potential party members that the party is a meaningful participant in the political arena and worth joining. By precluding voluntary fusion, § 204B denies the New Party the ability to make this showing and thus severely burdens its First Amendment associational rights.

II. WHILE BANS ON INVOLUNTARY FUSION WOULD BE CONSTITUTIONAL, BANS ON VOLUNTARY FUSION ARE NOT NARROWLY TAILORED TO A COMPELLING STATE INTEREST

As noted above, the burden imposed upon political parties by a ban on electoral fusion is severe. The Petitioners present (Br. 40-50) a series of governmental interests that they believe are sufficient to justify these burdens, including the prevention of party splintering, voter confusion, and electoral distortions, along with promoting candidate competition. Despite the arguments set forth by the Petitioners, those governmental interests are simply insufficient to pass constitutional muster, at least in the context of the voluntary fusion at issue in this case.

The analysis would be different had the Democratic-Farmer-Labor Party not consented to Mr. Dawkins' appearance on the ballot under the New Party line. In that case, the state would have a significant interest in protecting the integrity of the primary election process by preventing intraparty disputes, which are properly resolved in the primary election, from spilling over into the general election campaign. In such a case, a ban on "involuntary fusion" would be narrowly tailored to further this very important interest.

A. So Long as the Major Party Does Not Object to Its Candidate Appearing on Both Lines of the Ballot, Preventing a Party from Nominating Its Chosen Candidate Does Not Serve the State's Interest in Preventing "Splintered Parties and Unrestrained Factionalism"

This Court has recognized the states' compelling interest in maintaining the integrity of the political process by preventing "splintered parties and unrestrained factionalism." *Storer v. Brown*, 415 U.S. 724, 735 (1974). To that end, the Court has upheld state election laws designed to

further the goal of having intraparty disputes resolved in the primary, rather than the general election. In *Burdick v. Takushi*, 504 U.S. 428 (1992), for example, the Court validated the Hawaiian ban on write-in voting that prevented dissatisfied cliques within parties from continuing to fight intraparty skirmishes past the primary stage through write-in candidates. Similarly in *Storer*, the Court upheld a California disaffiliation requirement that denied a general-election ballot position to independent candidates who either voted in the immediately preceding party primaries or had been affiliated with a political party during the year preceding the primary. By so doing, the California statute precluded "sore losers" from circumventing the primary's hurdle and, like the ban in *Burdick*, prevented them from continuing to fight already-settled debates.

A ban on involuntary fusion would be justified under the same reasoning. As the Petitioners make clear (Br. 47-49), fusion allows the continuation of intraparty debate when losing factions within a major party break off, form their own minor party, and then nominate the major party's candidate solely to push their own platform back into the spotlight. Those losing factions could then subvert the very process in which they had originally participated, just the type of injury this Court has recognized in cases such as *Storer* and *Burdick*. *See* William R. Kirschner, "Fusion and the Associational Rights of Minor Political Parties," 95 Colum. L. Rev. 683, 718 (1995) (suggesting that a ban on involuntary fusion is constitutional because involuntary fusion "subjects the internal decisions of political parties to the potentially destructive designs of forces external to these parties").

However, a ban on even voluntary fusion certainly is not justified under this rationale. Where a major party—the supposed victim of this practice—concurs with the second candidacy, there certainly can be no concern that the major party is being abused in the process. *See Eu*,

489 U.S. at 227 ("Presumably a party will be motivated by self-interest and not engage in acts or speech that run counter to its political success. However, even if a ban . . . saves a political party from pursuing self-destructive acts, that would not justify a State substituting its judgments for that of the party."). The major party's consent would serve the state's interest in keeping intraparty squabbles off the general election ballot by forcing the major party to address whatever controversial issues might arise from the minor party's cross-nomination when consent is given. In fact, a ban on only *involuntary* fusion would accomplish all of the same goals with significantly less danger of infringing on the rights of other parties. Indeed, the Petitioners apparently concede this point, noting (Br. 50) that the lack of a consent inquiry makes the Minnesota statute "somewhat broader than necessary to accomplish its asserted interests." Because § 204B goes well beyond what is necessary to prevent political party splintering when applied to the facts of this case, it is not narrowly tailored to this admittedly compelling state interest.[2]

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[2] As this discussion makes clear, a political party attempting to nominate a candidate already on the ballot representing another party has no constitutional challenge to a fusion ban where both parties do not consent to the dual nomination. But even in the absence of such a ban, a party withholding its consent to a dual nomination may have a constitutional challenge where the rules of that party specifically prohibit multiple nominations. In such a case, the party withholding consent must, at the very least, be permitted to withdraw its nomination of the candidate who, contrary to party rules, accepts an additional nomination. Though the issue certainly is not represented by this case, this Court has repeatedly recognized the primacy of internal party rules over state laws that burden internal party dynamics. *See, e.g., Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986); *Cousins v. Wigoda*, 419 U.S. 477 (1975); *Democratic Party of United States v. Wisconsin ex rel La Follette*, 450 U.S. 107 (1981); *O'Brien v. Brown*, 409 U.S. 1 (1972).

B. Preventing a Party from Nominating Its Chosen Candidate Does Not Further the State's Interest in Avoiding Voter Confusion

Similarly unfounded is Minnesota's argument that § 240B furthers the compelling governmental interest of preventing voter confusion that it asserts would arise when voters see two or more candidates listed under the same ballot.

First, the Petitioners' argument on this point simply underestimates the intelligence of the electorate. This Court has consistently held that highly paternalistic limitations on the information available to voters do not serve a state's legitimate interest in fostering an informed electorate free of confusion. *See, e.g., Anderson v. Celebrezze*, 460 U.S. 780, 797 (1983). Instead, the Court has recognized that voters are capable of independent thought, that more information and more choice do not pose a threat to the electoral process. As this Court noted in *Eu*, 489 U.S. at 229, and *Tashjian*, 479 U.S. at 221, "A state's claim that it is enhancing the ability of its citizens to make wise decisions by restricting the flow of information to them must be viewed with some skepticism." *See also Norman*, 502 U.S. at 290 (invalidating an Illinois statute supposedly preventing voter confusion by completely prohibiting candidates in one political subdivision from using the name of established political parties in other subdivisions).

Indeed, rather than misleading voters about a candidate's positions (Pet. Br. at 43), voluntary fusion actually fosters an informed and educated electorate. Where the minor party has a narrower platform than the major party, multi-party nomination gives voters more specific information about a candidate's stances on certain issues. For example, a nomination by the Green Party suggests to voters that a Democratic Party candidate is not merely "good enough" on environmental issues to pass muster with the Democratic Party, but so strong that the "harder-

to-please" Green Party wanted to nominate him as well. Likewise, a majorty party's refusal to consent to a minor party's nomination also provides voters with more information: a major party allowing every minor party to nominate its candidate except one espousing radical views, for example, sends a clear signal to voters that the major party does not tolerate those radical positions.

Similarly, Minnesota's statute cannot be justified simply as a mechanism for preventing clutter on the ballot. Of course, Minnesota has no compelling interest in having an aesthetically pleasing ballot for its own sake. While its interest in preventing a laundry list of frivolous candidates from confusing voters may be characterized as compelling, *see Lubin v. Panish*, 415 U.S. 709, 715 (1974), this Court has upheld only those ballot-access restrictions that ensure that numerous frivolous candidates do not distract voters from the serious ones. To that end, states may require candidates to demonstrate a "modicum of support" so that frivolous candidates do not overcrowd the ballots. *See, e.g., Munro v. Socialist Workers Party*, 479 U.S. 189, 193 (1986) (upholding a Washington requirement that denied general election ballot access to candidates who failed to garner 1% of the total votes cast in an open primary); *Jenness v. Fortson*, 403 U.S. 431, 442 (1971) (upholding a law conditioning ballot access for those other than major party nominees on a nominating petition signed by 5% of eligible voters).

Constitutionally suspect, on the other hand, are laws such as this one that do not consider whether parties or candidates are "serious or spurious," but instead exclude parties and aspiring nominees from the ballot for reasons unrelated to their electoral viability. *See Lubin*, 415 U.S. at 717 (holding that California may not exclude an indigent from the ballot solely because of his inability to pay a filing fee); *American Party of Texas v. White*, 415 U.S. 767, 794-95 (1974) (overturning Texas law allowing absentee ballots to contain only the names of the

Democratic and Republican parties). Minnesota's signature requirement and other qualifications for minor party status already weed out frivolous parties and candidates, thus negating the Petitioners' claim that fushion invites the development of longer and more complex ballots. Because these other requirements automatically block the development of confusing ballots, a ban on voluntary fusion does not further any compelling state interest related to voter confusion.

C. Preventing a Party from Nominating Its Chosen Candidate Does Not Further the State's Interest in Preventing Manipulation of the Ballot

The Petitioners posit (Br. 45) that prohibitions on fusion further the goal of preventing ballot manipulations in two ways: (1) by making it more difficult for parties to disrupt each other's primary processes through "party raiding"; and (2) by preventing major parties from placing their candidates on the ballot more than once and presumably increasing the likelihood of receiving votes. Neither comes close to justifying the significant burden placed upon new parties by this statute.

Although Minnesota enjoys a legitimate interest in preventing party raiding, *see Rosario v. Rockefeller*, 410 U.S. 752, 760-62 (1973), electoral fusion is wholly unrelated to that interest. First, the factual scenario that the Petitioners posit is so improbable as not to merit serious consideration by this Court. Members of a major party could not infiltrate a minor party so as to disrupt the latter's internal processes without drawing significant—and quite adverse—public attention. But more fundamentally, numerous cases from this Court make clear that all political parties enjoy the freedom to impose reasonable limitations upon participation in their own primary elections. *See, e.g., id.* at 762 (upholding a New York law imposing a waiting period before new members may vote in party primaries); *Storer v. Brown*, 415 U.S. 724, 733 (1974) (sustaining the validity of a one-year

party disaffiliation requirement for independent candidates). Indeed, the very case cited by the Petitioners as evidence that such raiding can occur, *Zuckman v. Donahue*, 80 N.Y.S.2d 698 (App. Div.), *aff'd*, 81 N.E.2d 371 (N.Y. 1948), upheld the right of the minor party to exclude the "raiders" from participating in the minor party election. This minor party, like others under this Court's clear precedent, is more than capable of guarding against such a threat without the "protection" of statutory prohibitions.

Nor is banning voluntary fusion narrowly tailored to the state's asserted interest in reserving the printed ballot for parties with minimum levels of support. If the state's concern were a minor party's ability to obtain an automatic place on the next general election ballot for all of its candidates solely by garnering 5% of the electoral votes for a fusion candidate, the state could readjust its ballot access laws to address that fear more directly. Though the issue of "disaggregation" is not presented by or necessary to this case, Minnesota could deny automatic general election ballot access to such parties until they nominate single-party candidates who demonstrate a certain level of support. *See* Note, "Fusion Candidacies, Disaggregation, and Freedom of Association," 109 Harv. L. Rev. 1302 (1996). This would still enable minor parties to nominate their chosen candidates and prove their electoral viability while still meeting Minnesota's interest in reserving automatic spots on the general election ballot for parties that have demonstrated a certain level of voter support.

D. Preventing a Party from Nominating Its Chosen Candidate Does Not "Promote Candidate Competition"

The Petitioners' novel suggestion that precluding voluntary fusion is justified because it "promotes candidate competition" simply flies in the face of reason. This Court's party-autonomy jurisprudence emphasizes the de-

sirable notion that "competition in ideas and government policies is at the core of our electoral process and of the First Amendment freedoms." *Williams v. Rhodes*, 393 U.S. 23, 32 (1968). Competition, whether in the electoral arena or in the marketplace, is not promoted when the government forces inferior goods or candidates into the market. The government cannot coerce a political party to nominate someone other than its first-choice candidate in order to promote the type of debate that the government sees as healthy. It is not the place of the government to conclude, as the Petitioners in this case have (Br. 20), that the New Party nomination "would have done nothing to enhance the choice of candidates available to the voters." Rather, it is left to the citizens—and to associations of citizens that make up the parties—to determine which ideas will be propounded and by which nominees.

CONCLUSION

For these reasons, the Republican National Committee urges this Court to rule that Minnesota's ban on dual nominations is unconstitutional as applied to this case and to affirm the judgment of the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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August 19, 1996

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